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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-third session

SUMMARY RECORD OF THE 26th MEETING

Held at the Palais des Nations, Geneva,
on Friday, 23 August 1991, at 10 a.m.

Chairman: Mr. JOINET

later: Mr. TURK

CONTENTS

The administration of justice and the human rights of detainees (continued)

(a) Question of human rights of persons subjected to any form of detention and imprisonment (continued)

(b) Question of human rights and states of emergency (continued)

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CONTENTS (continued)

(c) Individualization of prosecution and penalties, and repercussions of violations of human rights on families (continued)

(d) The right to a fair trial (continued)

Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (continued)

Organization of work (continued)

The meeting was called to order at 10.30 a.m.

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES (agenda item 10) (continued)

(a) QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION AND IMPRISONMENT (continued)

(b) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY (continued)

(c) INDIVIDUALIZATION OF PROSECUTION AND PENALTIES, AND REPERCUSSIONS OF VIOLATIONS OF HUMAN RIGHTS ON FAMILIES (continued)

(d) THE RIGHT TO A FAIR TRIAL (continued)

(E/CN.4/Sub.2/1991/19 and Add.1, 20-29, 50, 53, 56, 60; E/CN.4/Sub.2/1991/NGO/18, 19, 26-28; E/CN.4/1991/18; E/CN.4/Sub.2/1990/10, 30, 32; A/CONF/144/28 and INF.2)

INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS (agenda item 11) (continued) (E/CN.4/Sub.2/1991/30 and Add.1-4; E/CN.4/Sub.2/1991/NGO/17; E/CN.4/Sub.2/1990/35)

1. Mrs. KIRONGORI (Observer for Zaire), making a statement equivalent to a right of reply, recalled that the International Association against Torture had spoken at the 24th meeting on the situation of detainees in Zaire. She pointed out that two years previously Zaire had invited the Special Rapporteur of the Commission on Human Rights, Mr. Kooijmans, and a report had been established after a mission lasting 10 days. Amnesty International had a standing invitation to visit Zaire, which had nothing to hide. The difficult material and health conditions of detainees simply reflected the difficult economic situation her country was experiencing, and nothing more. On 7 August 1991 a national conference of all political parties had opened in Zaire to enable the democratic process to unfold in dialogue and national consensus. Zaire was attentive to everything that touched upon collective and individual liberties and the improvement of machinery for their protection: in short, to democratic values.

2. Mrs. DAES warmly congratulated Mr. Treat and Mr. Chernichenko on their excellent report on the right to a fair trial (E/CN.4/Sub.2/1991/29) and wholeheartedly endorsed all their recommendations, in particular those referring to the possibility of preparing a model code or declaration. She wished at a later stage to become a co-sponsor of their proposal.

3. Mr. Türk took the Chair.

4. Mr. JOINET, Special Rapporteur, introducing his report on the independence of the judiciary, and the protection of practising lawyers (E/CN.4/Sub.2/1991/30), said that the report was necessary because almost all reports of the United Nations and especially of the Sub-Commission showed that in all provisions for human rights protection the judge's role was decisive; any programme that did not take account of that fact ran a high risk of failure. The matter was currently highlighted by the evolution everywhere in

the world of popular participation and democracy: the independent status of the judiciary was the safeguard of progress on that path. The terms of reference of the report were twofold: the first aspect dealt with training as a way of strengthening independence, for the sake not of the judge but of the ordinary man subject to the law. The consideration of how to improve international activity to promote independence had led him to offer a thorough and frank account of the relevant advisory services and technical assistance programmes so that trends could be discerned for the future. The other aspect of his terms of reference concerned policies implemented by Governments: measures and practices, positive or negative, aimed at strengthening or weakening the independence of the judiciary and the protection of lawyers.

5. A benchmark for assessing the positive or negative character of those practices and measures was the United Nations instruments, some of which were the Sub-Commission's own contribution, and which concerned basic principles of the independence of the judiciary, the independence of the office of the prosecutor, and the role of the bar. A compilation of them could be found in the annex to document E/CN.4/Sub.2/1991/26.

6. On Part One, he stressed the difficulty of improving the situation and optimizing the advisory services and technical assistance programmes without concurrently strengthening the resources of the Centre. Improvements, however, could be made: the material aspects were not the only factor. There was an extreme variety of suppliers of services; although his "audit" mainly concerned the programme of the Centre, he had been interested to discover that training wholly or partly intended for judges and lawyers existed in the Crime Prevention and Criminal Justice Branch of the United Nations Centre for Social Development and Humanitarian Affairs in Vienna; in the United Nations Crime Prevention Institutes in Rome, San José and Tokyo, and in the UNHCR, CICR, UNDP, WIPO, etc. There was thus a real problem of coordination. In addition to the variety of suppliers there was variety in the services supplied by the Centre: training courses, workshops and seminars. In 1988 they had been held in Togo, Tunisia, the Soviet Union, Italy, the Philippines; at Geneva, there had been an international seminar on the teaching of human rights. Paragraph 40 alluded to the importance of the role played by the National Commission on Human Rights presided by Mrs. Bautista in the preparation and success of the Manila workshop.

7. In 1989 the recipients of services had been Guinea, Ecuador and the Philippines, where 20 members of the armed forces had participated in the workshop. In 1990 Uruguay had been a beneficiary.

8. In addition there were the advisory services of the Commission itself, which had appointed experts in Guatemala, Haiti and Equatorial Guinea. There was some risk of diversion from the final aim of those services, since they were a remedy and not an endorsement: in case of a marked deterioration in the situation in the countries concerned, the mandate of the expert should be either withdrawn or strengthened by including in it an analysis of the evolution of the human rights situation.

9. The technical assistance services of the Centre had yielded excellent results in Colombia, where an independent consultant had made an extremely positive evaluation. There had also been programmes in Guatemala, Equatorial Guinea, Paraguay and Romania.

10. With regard to individual internships at the Centre for "outstanding graduate students" (para. 99) those might be extended, as had been requested by members of the Working Group, and interns might be called upon to assist members of the Sub-Commission. Services furnished by other United Nations bodies besides the Centre and the Commission on Human Rights were listed in paragraphs 108 to 137.

11. With regard to the measures and practices aimed at strengthening the safeguards of independence and protection, he thanked the States mentioned in the report for their close cooperation with the note verbale by the Secretary-General and, in addition, the Governments of Ireland, Japan, Romania and Rwanda, as well as the Japan Federation of Bar Associations. In that part of the report, Governments had had a chance to highlight their efforts in the field.

12. Turning to the measures and practices that had weakened the safeguards of independence and protection, he noted that, as the Government of Colombia had pointed out, it would have been better to say, measures and/or practices, for in the majority of cases the practices concerned were attempts against the lives of judges by death squads, often against the political will of the Government. He had tried for the first time to develop an adversary principle: the report had been based on a number of criticisms from different sources, and he had therefore asked the Secretariat to address systematically copies of those passages to the Governments concerned so that they could react to the allegations. He had published in their entirety the replies which had arrived in time, from Israel, Philippines, Sri Lanka and Turkey, as addenda 1 to 4 of the report. That procedure had enabled him to bring cases up to date, such as that of Kenya (para. 270); Mr. Imanyara had apparently been set free, and he was trying to verify that information. In Sudan (para. 233), 24 of the lawyers arbitrarily detained were said to have been freed.

13. He had also encouraged the observers of non-governmental organizations to join in his adversary procedure by taking into account, when using the report, not only the negative allegations but also positive measures. That would make a substantial improvement in the Sub-Commission's working methods and facilitate cooperation: he did not wish that some of the Governments that had cooperated should therefore be penalized.

14. Although he might have described the identity crisis of the judiciary in many countries, including his own, in the second part of his report, he had been faced with an emergency. Consistent statistics had indicated 34 summary or arbitrary executions of judges and lawyers between January 1988 and June 1989, and 64 summary or arbitrary executions of judges and lawyers between July 1989 and June 1990, as well as a number of other forms of persecution. He had therefore given priority to that situation.

15. However, a more refined approach was needed for those statistics, which had to be subjected to the adversary procedure. He had transmitted that passage of his report to the Colombian Government, and had found that the statistics could be completely distorted according to the periods selected; for example, there had been many summary executions between the dates in his

report, but if the dates August 1990 to August 1991 were used, corresponding to training programmes and sessions on the security of judges, it could be observed that there had been only one assassination during that period.

16. Apart from physical attacks on and arbitrary detention of lawyers, there had also been weakening of statutory safeguards; Sudan was a typical example (para. 249). The scope of violations of the independence of the judiciary there since 1989 had led him to publish the entire list of judges who had been persecuted, as well as a list of measures undermining statutory safeguards. Finally, he had mentioned states of emergency, but only briefly so as not to overlap the work of Mr. Despouy.

17. With regard to his conclusions, he stressed the follow-up of programmes: when a budget was given to a particular programme, a percentage of, say one fifth should be allocated to follow-up by one of the experts or participants six months or a year after the workshop or course.

18. The training of judges was too often approached simply as a technical programme. He had once defined the worst fault of a judge as textual obsession; if a judge was trained only in the technique of law he tended to apply the letter of the law and not to introduce the requisite equity. The best quality for a judge was an allergy to routine: stereotyped training led not to independence but to self-dependence. There was thus a direct relation between the conception of training and the affirmation of the independence of the judiciary.

19. Mr. GUISSE thanking Mr. Joinet for his thorough report (E/CN.4/Sub.2/1991/30), said that he supported his ideas and would like him to study in greater depth questions relating to certain concepts that were new in United Nations practice. The assigning of experts to assist certain States was a useful, positive and necessary step in training, but it should be accompanied by monitoring and a final evaluation; in putting an expert in the hands of a Government there was a risk that he might be diverted from his primary aim of assisting a country to elaborate norms for the independence of its judiciary. He therefore encouraged Mr. Joinet to better ensure the success of missions by carrying out monitoring, with a report and assessment at the end.

20. Mr. Joinet had stressed the importance of coordination between United Nations institutions in assistance to the point of proposing that the Vienna and Geneva Centres should be combined. That was an elegant proposal, but the linking of the Vienna Centre to Geneva should not diminish the effectiveness of the Geneva Centre, which had techniques and special practices giving it specific jurisdiction in the fight against crime. A coordination like that between CERD and the Sub-Commission would give complete satisfaction while retaining the individuality of the two institutions.

21. He agreed with Mr. Joinet's proposals regarding positive measures for the protection of judges but thought that consideration should be given to extending their protection after their term of office. By many of their decisions they had made enemies; they needed to be protected throughout their career in order to have the peace of mind necessary for their independence.

Judges or lawyers were not the only actors in the judiciary; the protection of others, such as bailiffs and commissioners of oaths, should also be considered in the report.

22. Mr. Joinet's report and the reports of other members of the Sub-Commission should be coordinated because the independence of the judiciary and the fairness of trials converged in a concept of the highest level of justice, which constituted the greatest protection for the rights of everyone. International legal standards should be introduced in the training of judges so that the judge would have a deeper and more protective conception of the individual and his rights.

23. Mr. DESPOUY, said that he wished to draw attention to two issues which, in his view, were very important in connection with Mr. Joinet's report (E/CN.4/Sub.2/1991/30). The first concerned method and the second related to technical assistance and the development of additional means for safeguarding the independence of the judiciary.

24. He considered that it was important that the adversary method should be employed as it would allow States to make their observations on or corrections to information received, particularly in regard to respect for human rights in states of exception or emergency. In states of exception the adversary system was particularly beneficial and should be continued as also should the system of Special Rapporteurs. Mr. Joinet's report had not been specific enough on the need for ensuring continuity in applying the adversary method and he hoped that lacuna would be filled in the future.

25. On the issue of technical assistance, three aspects were important. The first related to coordination within the United Nations system which should be further encouraged. It should, however, be remembered that each agency had its own individuality and it was important that that identity should be retained within the operation of the system of coordination.

26. The second point related to the advisory services of the Commission on Human Rights. Paragraph 290 of the report mentioned limitations on the rendering of such services. In his view the suggested limitations were excessive. There was for example no need to take infrastructure into account; otherwise he concurred with the conclusions of the Special Rapporteur on the conditions in which advisory services should be granted, in particular the need for minimal respect for human rights in the country concerned. The role of the expert providing the services might be expanded somewhat by giving him the right to make his own comments on the situation.

27. The third point related to seminars and other technical assistance. He approved of the detailed criteria suggested for the organization of seminars as well as the points which evaluations of technical services should cover. Further information was however needed on how resources were to be allocated and in that connection he would welcome greater reference to the work of the Centre for Human Rights which had had considerable experience in that field. He regretted that the Special Rapporteur had not drawn on that experience sufficiently in such fields as cooperation with UNDP. In that connection he referred to cooperation in technical assistance in Paraguay, the value of which during the dictatorship had amounted to $600,000 but had, currently

reached $5 million, most of which was devoted to the issue of human development. It would be important to develop more detailed information in that field.

28. Mr. SACHAR noted that, in paragraph 20 of his report (E/CN.4/Sub.2/1991/30), Mr. Joinet had referred to the reasoning applied by the Inter-American Court of Human Rights in connection with habeas corpus. The right of habeas corpus should be available to all. In India it was non-derogable in respect of the right to life and liberty, even in states of emergency. In that connection he asked the Secretariat to confirm whether the word "indefensible" which was used twice in the last two lines of paragraph 20 should not in fact read "indefinable".

29. In India, High Court judges enjoyed tenure up to the age of retirement and could only be removed from office by impeachment. Members of the lower judiciary could be removed on the order of the High Court only; in neither case did the executive power have any role to play. In fact the superior judiciary had total control of the lower judiciary.

30. Much thought had recently been devoted to the topic of possible misconduct by judges. Judges could not be a law unto themselves and it had been argued that there should be a law under which a complaint lodged against a judge could be pursued. The impeachment process was much too cumbersome in actual practice but it was important that means should be found which would help to buttress the confidence of people in the integrity of judges.

31. He had been shocked at the statistics contained in paragraph 212 relating to violation of the physical integrity of judges in many countries. In India, there was no physical danger to judges.

32. It was true that the contempt of court law could be used by judges to stifle criticism. There was a case for liberalizing that law with a view to avoiding the possibility of abuse. Judges enjoyed no immunity from prosecution after retirement.

33. Public prosecutors had been part of the police system in the days of colonial rule. They were currently an independent institution and had been given the power to withdraw a case even if the Government should not be in agreement with such a decision. A public prosecutor therefore needed to have an independent mind.

34. In India, under the Bar Council Act, lawyers were independent and not subject to the courts in matters of discipline. Proceedings in such matters must be initiated in their own governing body. There was a right of appeal to the courts but the courts could not proceed directly against a lawyer. That situation had been criticized on the grounds that it was ineffective because lawyers might turn a blind eye to the misdeeds of other lawyers.

35. He considered that there was room for a further paper on additional steps which might be taken to safeguard further the independence of the judiciary and trusted that the Special Rapporteur would be given such a mandate.

36. The democratic system was based on the strength of the judiciary to the extent that the courts could review any decision of the Executive. In India, any proposed change to the Constitution must be approved by Parliament. The Supreme Court had ruled that the basic constitutional structure in respect of Parliament, democracy and judicial review could not be amended.

37. Turning to item 10 (d), he considered that the Sub-Commission should not study the topic of the privatization of prisons. Prisons were the preserve of the State and were there to punish people who had violated the law.

38. Mr. RIVAS POSADA welcomed Mr. Joinet's study (E/CN.4/Sub.2/1991/30) which dealt with problems prevalent in many parts of the world on which no agreement had apparently been reached.

39. The two aspects of the document - the study of measures and practices that had strengthened or weakened the safeguards of independence and protection, and advisory services and technical assistance - were closely connected, but the document none the less gave an impression of great dichotomy. In adopting the terms of reference of the study it would have been better to make a clear distinction between the status of the two parts.

40. He considered that the expression "measures and practices" was unsatisfactory. A clear distinction should be made between governmental measures to safeguard independence and practices that did not depend on political will.

41. The study would have gained by giving greater attention to two problems now so prevalent that they were undermining the independence of the judiciary: namely the establishment of special courts to judge cases of drug trafficking, and military courts. Such courts were now so widely used that information should be provided by Governments and non-governmental organizations on the circumstances in which they were employed and their impact on human rights.

42. The study was not merely academic: it should provide recommendations to Governments and guidelines to combat the problems. In that connection it would be useful to adopt a regional approach which would clarify many ideas and help to improve the technical assistance and advisory services provided by the Centre for Human Rights.

43. He congratulated Mr. Joinet on his report and hoped that future versions would be broader in scope.

44. Mr. TREAT said that the Sub-Commission now had an excellent body of work on the subject of detention, including the reports by Mrs. Daes on the protection of persons detained on grounds of mental health and by Mr. Joinet on administrative detention. The Sub-Commission could take pride in that work.

45. In connection with Mr. Joinet's study (E/CN.4/Sub.2/1991/30), he said that an important innovation, now becoming increasingly accepted at State and federal level in the United States, was regular training to bring judges up to date on developments in the legal system. Some judges welcomed that type of training, others were reluctant to become involved in programmes requiring

them to leave their court and their family. The highest United States court had adopted a rule of court requiring judges to attend continuing education programmes accredited by an appropriate body at least every two years. Funding was available from Government and private sources to meet the expenses of judges attending such courses. In his experience private funding was preferable, since it allowed a greater degree of independence in training.

46. A national college for judges set up at Williamsburg, Virginia, with private funding now had a continuing programme of education. It had an endowment which, together with the registration fees of participants, made it practically self-supporting.

47. He had discussed with the Deputy Chairman of the Supreme Court of the USSR the possibility of a similar programme in that country. In countries with an evolving judicial system it was important that educational programmes should be held, for it was almost impossible for a judge to reorient his thinking without some such training.

48. He had taken particular note of the comments of Mr. Guissé and others that there should be some cooperation among those working on overlapping studies in the area so that the time of the Sub-Commission and the Commission should not be taken up unnecessarily.

49. He welcomed the study made by Mr. Despouy on human rights and states of emergency and the non-derogability of certain rights (E/CN.4/Sub.2/1991/28), as well as the working paper by Mr. Alfonso Martínez on the privatization of prisons (E/CN.4/Sub.2/1991/56).

50. He thanked his colleagues for their useful comments on the study on the right to a fair trial by himself and Mr. Chernichenko (E/CN.4/Sub.2/1991/29). The authors would try to incorporate those comments in their next report.

51. Mr. EIDE said that the matters covered by items 10 and 11 of the agenda were essential to the rule of law and the promotion of human rights. Mr. Despouy's work on limiting the scope of states of emergency was particularly important. The report by Mr. Chernichenko and Mr. Treat on the right to a fair trial (E/CN.4/Sub.2/1991/29) was a major contribution to developing an internationally recognized code of conduct in the administration of justice. He agreed that habeas corpus should be dealt with in subsequent versions of the study by Mr. Chernichenko and Mr. Treat.

52. He endorsed the approach in Mr. Joinet's study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/1991/30), and agreed with Mr. Rivas Posada that greater attention should be paid to military courts. The question of the impartiality of military judges, whose cast of thought was not necessarily democratic, should be investigated. He welcomed Mr. Joinet's recommendations, and stressed the need to monitor developments, both positive and negative. Information on such developments should be widely circulated in the relevant countries so as to encourage awareness that monitoring was taking place. Moreover, government replies should be published domestically, in order to provide an element of protection when judges and lawyers were at risk.

53. On an entirely different matter, he said that in countries emerging from what they considered occupation or domination, emotions ran high about past events and collaboration with the occupying regime, with a consequent danger of overreaction and of sweeping measures being taken too quickly. A case in point was the Baltic States which he had visited earlier that year. He had met people with different views but all with strong reactions against what had been done by the Soviet armed forces. Some, however, had cautioned against replacing censorship of one kind by censorship of another. Unfortunately, in Lithuania a wide range of Russian-language publications had been banned. The international status of Lithuania was unclear, but the Sub-Commission and the non-governmental organizations concerned with freedom of information should look into the matter, which the Sub-Commission would discuss under item 4. He understood that a full report on events in Lithuania would be sent to the Commission on Human Rights. It was very helpful for the international community to address such problems at an early stage.

54. Mr. BRODY (International Commission of Jurists) welcomed Mr. Joinet's report (E/CN.4/Sub.2/1991/30), which was remarkable both for its substance and methodology.

55. The first section of the report made a comprehensive and penetrating critique of the strengths and weaknesses of the United Nations programme of advisory services. As far as seminars and workshops were concerned, Mr. Joinet's conclusions largely reflected recommendations which the ICJ and other non-governmental organizations had been making for several years. It was encouraging that the Centre for Human Rights had already taken steps in some of the directions indicated by Mr. Joinet. The ICJ also endorsed the recommendations that seminars should focus more specifically on the independence of judges and lawyers.

56. The second part of the report set out information provided by non-governmental organizations, including associations of judges and lawyers, to which Governments had been asked to respond.

57. Though Mr. Joinet had stated that the cases listed were merely illustrative, it was clear that in all too many countries lawyers and judges risked their liberty and their lives trying to carry out their professional obligations including the defence of human rights.

58. Unfortunately the picture painted by Mr. Joinet was confirmed and even reinforced by reports released by the Centre for the Independence of Judges and Lawyers of the ICJ. The report covering the period June 1990 to May 1991 listed 532 judges and lawyers who had been killed, detained or harassed in 51 countries. Of those, 55 lawyers and judges had been killed, 103 detained, 42 attacked and 65 had received threats. The report also described cases in which the Government had moved to undermine the independence of the bench and the bar as a whole.

59. Nowhere in the world did judges and lawyers work at such risk as in Colombia. The vast majority of the 36 judges and lawyers assassinated in the last year had, in effect, been investigating not drug trafficking but paramilitary activities and massacres attributed to security forces.

60. In Sudan, the military Government had replaced the court system with tribunals. Over 120 judges had been dismissed and replaced by fundamentalists, the Bar Association had been banned and 17 lawyers thrown in jail where many remained without charge or trial.

61. In the Israeli occupied West Bank and Gaza Strip, Palestinian lawyers faced legal obstacles preventing them from helping their clients, as well as harassment from the military authorities.

62. In Yugoslavia, the Serbian authorities had dismantled the judiciary in the autonomous province of Kosovo, dissolving numerous courts and removing at least 180 ethnic Albanian judges, prosecutors and State lawyers.

63. In Rwanda, lawyers, representing alleged rebels in mass trials had been accused by the judges of sympathy with their clients and threatened by pro-government mobs.

64. In Peru, 10 jurists had been killed in the past year. Judges and lawyers in Peru who had to investigate, prosecute and try cases of terrorism or cases of human rights violations were caught between the two fires of the guerrilla forces and the military.

65. In Paraguay, lawyers investigating alleged killings and torture by officials of the Stroessner Government had been threatened with death.

66. In Turkey, 11 lawyers had been detained. The blind defence lawyer Esber Yagmurdereli had been in detention since 1978 after being convicted of political offences in an unfair trial.

67. In many countries lawyers had been detained for speaking out in favour of the rule of law. In Kenya, the Government's detention of seven prominent human rights lawyers and its harassment of The Nairobi Law Monthly had been part of an attempt to silence the movement for a multi-party system. Eleven jurists had been jailed in China for their pro-democracy sympathies. Eight were detained in Myanmar.

68. In several parts of the world Governments had used the power of contempt of court referred to by Mr. Sachar in an attempt to silence the bar, notably in Malaysia, the Central African Republic, Kenya and Rwanda.

69. Attacks on justice were not limited to developing countries. Judges in France and Italy whose investigations had brought them too close to sensitive political issues had found those activities abruptly curtailed. A politically active lawyer in the United States who refused to yield information regarding a former client spent six months in jail for her loyalty, while another faced prison in similar circumstances. Lawyers in Spain looking into government connections with anti-terrorist hit squads had had explosives planted under their car.

70. He suggested that Mr. Joinet's updated report should include more information on measures that strengthened or weakened the structural independence of the judiciary and the bar. In Argentina and Nicaragua, newly elected Governments had sought to bring the judiciary under their control by

expanding and then "packing" the Supreme Court. In recent years regular civilian courts had been replaced with military and special tribunals on a wide scale in Myanmar, Ghana, Israel, Nigeria, Pakistan, Sudan and Tunisia, to name only those surveyed in the ICJ report.

71. The United Nations Basic Principles on the Role of Lawyers which had been welcomed in resolution 45/166 by the General Assembly covered the harassment of lawyers for undertaking the representation of clients or causes, but went much further, giving special attention to effective access to legal assistance for all groups within society, the right of the accused to counsel of his or her own choosing, the training and qualification of lawyers, the prevention of discrimination in the legal profession, the role of bar associations and the obligation of lawyers to keep communications with their clients confidential. The General Assembly had invited Governments to be guided by those Basic Principles in formulating appropriate legislation and policy directives and to make efforts to implement them. Future reports could therefore examine the implementation of those provisions.

72. Mr. LESTOURNEAUD (International Union of Lawyers) said that one of the main concerns of his organization (IUL) was to follow up the conditions in which justice was administered throughout the world, with particular reference to the criteria set forth in United Nations instruments. In that connection, the independence and impartiality of judges constituted, with an effective guarantee of the rights of the defence, an indivisible whole necessary to ensure a fair trial. Article 1 of the International Charter of the Rights of the Defence, adopted by IUL in 1987, closely associated the ideas of independence, impartiality and fair trial. Together with other NGOs particularly concerned with agenda item 11, IUL had declared its strong attachment to the basic principles adopted in the United Nations to protect judges and lawyers in the exercise of their professions. However, Commission on Human Rights resolutions 1989/32 and 1990/33 had emphasized the need for the Sub-Commission to concentrate on monitoring.

73. IUL had joined with other NGOs in denouncing the persistence of individual or collective violations committed against judges and lawyers in several States. The third annual report of the International Commission of Jurists referred to 532 cases of clear violations of the human rights of judges and lawyers threatened or subjected to physical pressure. The situation in the Yugoslav province of Kosovo was particularly in evidence because of the mass destitution of 180 judges, procurators or lawyers on the sole ground of their Albanian ethnic origin. Thus, from 145 cases in 1989, there had been 430 in 1990, and 532 in 1991. Since August 1990, his organization's "defence of the defence" commission had intervened in 20 different countries to deal with 32 violations. Such a very sharp increase in the number of violations was clearly a source of concern, and the encouragement given to States to ratify the appropriate international instruments must be supplemented by other measures, such as the establishment of an authentic investigatory body under the auspices of the United Nations, with the cooperation of specialized NGOs.

74. IUL therefore requested the Sub-Commission to follow up Mr. Joinet's recommendation that there should be increased participation in the Centre's activities by lawyers, judges and representatives of NGOs. IUL also requested

the Sub-Commission to renew Mr. Joinet's terms of reference to enable him to provide further information on legislative or judicial measures or other practices which had served to strengthen or to undermine the independence of the judiciary and the protection of lawyers by reference to United Nations standards.

75. Ms. NICHOLSON (Lawyers Committee for Human Rights (LCHR)) said that her organization had been working since 1978 to protect and promote human rights in accordance with international standards. Its focus had been to examine human rights issues from a legal perspective and to formulate proposals for changes in legal systems to remedy deficiencies. In doing so the organization had worked with national legal groups and individuals wherever possible.

76. The independence of judges and lawyers lay at the heart of its work. The organization was particularly active in responding to the harassment and persecution of lawyers and judges who were trying to fulfil their professional obligations or who advocated support for human rights. Through its "Lawyer-to-Lawyer Network" and working in close collaboration with other NGOs, her organization sought to bring to the attention of the legal community in many parts of the world the plight of colleagues who faced such harassment or persecution.

77. LCHR very much welcomed Mr. Joinet's excellent report (E/CN.4/Sub.2/1991/30). It considered it a pity that only 17 countries had offered information on measures that had been useful in helping to ensure such independence and protection. It urged that in subsequent reports ideas on additional practical protection measures be actively solicited from professional associations and other NGOs worldwide.

78. Her organization continued to be seriously concerned with attacks on judges and lawyers in many countries. The Sudanese Government's mass arrests and detentions of lawyers and judges in 1989-1990 and the banning of the Sudan Bar Association was an especially shocking example of an assault on the rule of law. Although several persons had been released on or before 1 May 1991, the situation remained a source of grave concern: the state of emergency and the decrees issued thereunder were still in force; the special tribunals continued to operate; key organizations, including the Bar Association, remained banned; State control over the Bar continued; none of the judges had been reinstated, and the military had replaced them with its own political appointees.

79. Lawyers in Kenya who had been among the most active advocates of the rule of law had been harassed and subjected to arrest and detention by the authorities. In Myanmar, lawyers challenging the military Government were often detained without charge and those that were charged were tried before three-person military tribunals which considered their cases in camera. In Peru and Colombia judges risked, and in some cases sacrificed, their lives in their efforts to administer the law impartially. In those countries, beyond the evidence of complicity by military or security forces, private armies and terrorist groups joined in creating conditions of pervasive lawlessness. None of those Governments had responded to the information contained in the report of the Special Rapporteur.

80. LCHR was also concerned about the situation of lawyers in Israel and the Israeli-occupied territories, the Philippines, Sri Lanka and Turkey, and it had therefore been interested to read the responses of the Governments of those countries on the reports of harassment and persecution of lawyers and judges. LCHR welcomed Mr. Eide's suggestion that they be widely publicized in the countries concerned.

81. In her organization's view, the responses failed to answer the specific concerns raised in the Special Rapporteur's report. For example, attorneys in the Occupied Territories had been administratively detained while the authorities had claimed that they were suspected of belonging to illegal organizations. As in all cases of administrative detention, they had not been allowed access to their files nor to the evidence against them, which was secret.

82. The response from the Government of the Philippines sought to demonstrate that the Government had actively investigated cases where human rights lawyers had been the targets of abuse. Instead, it pointed to the Government's largely ineffectual efforts to conduct thorough and sustained investigations of human rights violations and to prosecute those responsible. That failure had been documented by the Working Group on Enforced or Involuntary Disappearances, as well as by several non-governmental organizations. The Government had also avoided taking a public stand within the country in defence of lawyers who were the targets of harassment, particularly by the military or the police.

83. LCHR had been pleased that, in resolution 1990/23, the Sub-Commission had asked for a "system-wide analysis of the advisory service and technical assistance programmes of the United Nations as regards the independence of the judiciary and the protection of practising lawyers". It welcomed the serious attention given to that matter in Mr. Joinet's report. Over the past two years LCHR had examined various aspects of the advisory services and technical assistance programmes, putting forward a series of recommendations which it felt would promote a much more effective use of the limited resources available to the United Nations in order to protect people from human rights violations. Mr. Joinet's recommendations for the implementation of guidelines and criteria and for improved cooperation between the various programmes were critical. Unless they were heeded soon, the human rights bodies of the United Nations risked losing credibility and the confidence of human rights victims around the world.

84. In many situations it was Governments that continued to make it difficult for lawyers to practise freely and judges to judge independently: lawyers who represented unpopular clients were detained, physically threatened, or killed; judges were threatened or removed from office when they expressed a determination to investigate and adjudicate cases involving official wrongdoing. In those circumstances, could it really be judged an appropriate response to give assistance to the Governments concerned? Could it really be hoped that the provision of textbooks and invitations to high-level international meetings would remedy the deficiencies in the legal systems in countries such as Sudan, Kenya or China?

85. In February 1990, LCHR had published a report which attempted to evaluate the effectiveness of the United Nations advisory services and technical assistance programmes in relation to Guatemala, where the human rights situation continued to be grave and was in some respects deteriorating. The administration of justice continued to be undermined by attacks against those involved in the criminal justice process. The killing of Myrna Mack had recently become a key test case of the Guatemalan Government's willingness to hold members of its military and security forces accountable for human rights violations. Just over two weeks previously, a senior police investigator with important evidence for submission to the Organization of American States had been shot dead yards from the central police station.

86. In its February 1990 report, LCHR had recommended that, as a matter of the highest priority, the United Nations human rights bodies should return to their primary role of protecting people from human rights violations. In the past year and a half, the trend towards providing assistance rather than holding Governments that violated human rights accountable for their actions had continued. Bearing in mind the extremely limited resources available within the United Nations system for human rights programmes, the organization's effectiveness in protecting victims of abuse had suffered as a consequence. In his report Mr. Joinet had recommended minimum criteria for the provision of advisory services by the Commission on Human Rights and more precise, public criteria and guidelines for the provision of technical assistance by the Centre for Human Rights, urging full reports and proper evaluation of workshops and seminars relating to the independence of the judiciary and the protection of practising lawyers, including publication of the texts of any commitments made by Governments in the course of the workshops. Those recommendations should be given the strongest backing by the Sub-Commission and implemented forthwith.

87. Local human rights lawyers and other independent, non-governmental organizations were essential actors in sustaining the rule of law and the independence of the judiciary. Their role was to help enforce local and international legal standards. Increasingly, international NGOs saw their role as one of giving support to such groups and individuals. Yet the United Nations continued to exclude them. As Mr. Joinet's report pointed out, in the training courses, workshops and seminars organized by the Centre for Human Rights, neither legal professionals nor non-governmental groups were adequately represented. One recent illustration was the seminar on human rights and the administration of justice sponsored by the Centre for Human Rights held in Cairo during the previous month. While several international NGOs had been invited to participate, the 28 African national organizations and legal groups working with the OAU's African Commission on Human and People's Rights had been barely represented. The exclusion of such groups must be re-examined. LCHR urged the Sub-Commission to renew Mr. Joinet's mandate and looked forward to future reports on concrete measures and practices that had served to strengthen or weaken the independence of judges and lawyers. It stood ready to make whatever contribution it could in that area.

88. Mr. van BOVEN thanked Mr. Joinet for his important report (E/CN.4/Sub.2/1991/30) and expressed the hope that he would continue his work. The statements made in the debate had also been excellent. Much

emphasis had been placed on the role of the advisory services and technical assistance programmes. In that respect, he agreed that such activities could not be a substitute for protection procedures and that, in view of the limited resources available, priority should be given to monitoring compliance with treaty obligations.

89. In paragraph 306 of the report, reference was made to the existing links between the Centre for Human Rights and the Crime Prevention Branch, and it was even suggested that consideration should be given to attaching the Branch to the Centre. He would need to know the views of the Crime Prevention Branch before expressing an opinion on that point. He agreed with what had been said by the observer for the International Commission of Jurists, whose annual report monitoring serious incidents of the harassment and persecution of judges and lawyers would be very helpful to the Sub-Commission and should also be brought to the attention of Bar Associations throughout the world.

90. Mr. GUISSE, after requesting that Mr. Joinet's mandate should be extended, expressed his satisfaction that the crisis in the USSR had ended as everybody had hoped it would. He was confident that those arrested after the failure of the coup would enjoy all the guarantees of a fair trial. A little more prudence should be exercised in criticizing the situation in Kuwait, whose people were emerging from a nightmare experience. The role played by corruption in the administration of justice must not be overlooked. The practice of offering material rewards to individual judges in the lower courts was common in many countries, to such an extent that the public lost faith in the system.

91. Ms. JOLIDON (American Association of Jurists) said that the American Association of Jurists (AAJ) fully agreed with the observations made in Mr. Joinet's report (E/CN.4/Sub.2/1991/30). AAJ, together with two other NGOs, had already presented to the Economic and Social Council a document indicating the need to define more accurately the scope of the advisory services and technical assistance programmes and to implement programmes with the participation of NGOs, which should also be able to enjoy the benefits of the courses given by specialists. In its report, AAJ had also stated that the time had come to establish a governing body for the voluntary fund for advisory services and technical assistance. The recommendation made in paragraph 51 of the report, to the effect that advisory services supplied to Guatemala needed to be a remedy, not an endorsement, should be made a general rule applicable in all cases.

92. While wishing to draw attention to extreme cases of physical pressure brought against the judiciary, AAJ wished to point out that preserving the independence and impartiality of the judiciary was a worldwide problem that affected all, or almost all, countries, developed and developing alike. The impartiality of the judiciary included recognition, by the courts, of the primacy of the basic human rights acknowledged by the international community. That necessarily implied the existence of rules and procedures to prevent the perpetrators of violations of basic human rights from going unpunished.

93. In Argentina, the Due Obedience Act provided that any member of the military, security, police or prison services that committed offences with the alleged purpose of suppressing subversion had acted out of due obedience.

When the Supreme Court of Justice had ruled on the matter, Judge Bacqué, in his dissenting opinion, had stated that the Act was contrary to the principle of the separation of powers and a violation of the guarantee of due process. Legislation of that type, which violated the independence of the judiciary, had been one of the many mechanisms used in recent years by many Governments to exonerate the perpetrators of serious and systematic violations of fundamental human rights. Impunity had been guaranteed to those who had been involved in enforced disappearances, torture, and extrajudicial executions and to those who had offended against the right to life by committing large-scale economic crimes. The latter included not only corruption but also manoeuvres to provoke the indebtedness of a State and the impoverishment of the economically weakest sectors of society, condemning them to a slow but certain death. Systematic disappearances, executions and the torture of political opponents had occurred, not in an abstract framework, but as a response to the opposition of vast sectors of the population to what had often been criminal economic and financial policies. Many different kinds of mechanism had been used to exonerate military personnel who had committed common law offences and to elude the obligation to guarantee an effective remedy for the victims of human rights violations. The many laws that put forward due obedience as a ground for non-compliance with the principle of criminal responsibility, including the Due Obedience Act in Argentina and the Constitution in Colombia, were in clear contradiction with the Nuremberg principles, international jurisprudence, and article 9 of the draft code of crimes against the peace and security of mankind prepared by the United Nations International Law Commission. In AAJ's view, the perpetrators of particularly serious offences could not be amnestied.

94. Another mechanism used by some Governments to guarantee impunity was the establishment of a special prescription for offences committed by agents of the State, sometimes with retroactive effect. In the case of enforced disappearances, AAJ considered that the prescription should not begin to run from the time when the kidnapping took place, since the offence continued to be committed so long as the missing person had not reappeared, either alive or dead. As the Inter-American Court of Human Rights had stated, the duty to investigate acts of that kind continued as long as there was uncertainty as to the final fate of the missing person.

95. The range of mechanisms used to secure the impunity of perpetrators of serious violations of fundamental human rights produced serious consequences in so far as human rights were reduced to mere declarations leading to a denial of justice for the victims of violations and to the defencelessness of the population in general. In the view of the Working Group on Enforced or Involuntary Disappearances, impunity was probably the factor that contributed most to disappearances. AAJ therefore requested the Sub-Commission to initiate a study on impunity which would cover: the mechanisms used to bring about situations of impunity; the inadequacy of the effective remedy guaranteed by various human rights instruments and the general principles of international law; the extent to which such mechanisms constituted a serious violation of the right to an effective remedy and to a fair trial; whether the practice of securing impunity for all, or almost all, the perpetrators of serious violations of human rights, with the resulting denial of justice for the victims and defencelessness of the population as a whole, constituted in itself an offence in international law; consideration not only of the treaty

obligations of States but also of the peremptory norms of general international law; and a study of the means available in international law to combat practices guaranteeing the impunity of persons who violated human rights.

ORGANIZATION OF WORK (continued)

96. The CHAIRMAN drew attention to the excessive number of draft resolutions before the Sub-Commission. He wished, however, to announce to his colleagues an encouraging development in the case of East Timor. At the current session of the Sub-Commission, as at previous sessions, some experts, concerned about the human rights situation in East Timor, had taken the initiative of submitting a draft resolution on the subject. Having learnt of that initiative, he had requested that certain recent developments in the process of consultations initiated by the Secretary-General be taken into account and he had consulted the members concerned in an attempt to find a solution by consensus. Those developments included an agreement in principle to send a Portuguese parliamentary mission to visit East Timor and the announcement made by the observer for Indonesia in the Sub-Commission that the Special Rapporteur on Torture of the Commission on Human Rights would be invited to visit East Timor. Such a mission could only help to shed more light on the present situation. Consequently, the draft resolution on East Timor had finally not been submitted, as a gesture to promote the spirit of openness and to facilitate the work of the Special Rapporteur on Torture.

The meeting rose at 1.05 p.m.